

Office of Chief Counsel  
Internal Revenue Service

**memorandum**

CC:LM:FSH:MAN:2:TL-N-6873-00  
VATaverna

date:

to: Henry Singleton, Territory Manager,  
Financial Services and Healthcare  
Attn: Revenue Agent Tom McGrath, Group 1103

from: Area Counsel (Financial Services & Healthcare) (Area 1 - Manhattan,  
NY)

subject:

**Taxable Year**  
**Informal Claim for Refund**

UIL Nos. 6511.01-03, 6532.00-00, 7422.01-00,  
7422.01-01, 7422.01-06

**DISCLOSURE STATEMENT**

This advice may contain return information subject to I.R.C. § 6103. This advice may contain confidential information subject to attorney-client and deliberative process privileges and if prepared in contemplation of litigation, subject to the attorney work product privilege. Accordingly, the Examination or Appeals recipient of this document may provide it only to those persons whose official tax administration duties with respect to this case require such disclosure. In no event may this document be provided to Examination, Appeals, or other persons beyond those specifically indicated in this statement. This advice may not be disclosed to taxpayers or their representatives.

This advice is not binding on Examination or Appeals and is not a final case determination. Such advice is advisory and does not resolve Service position on an issue or provide the basis for closing a case. The determination of the Service in the case is to be made through the exercise of the independent judgment of the office with jurisdiction over the case.

This opinion is based upon the facts set forth herein. It might change if the facts are determined to be incorrect. If the facts are determined to be incorrect, this opinion should not be relied upon. You should be aware that, under routing procedures

which have been established for opinions of this type, we have referred this memorandum to the Office of Chief Counsel for review. That review might result in modifications to the conclusions herein. We will inform you of the result of the review as soon as we hear from that office, which should be in approximately 10 days. In the meantime, the conclusions reached in this opinion should be considered to be only preliminary.

We write in response to your request for advice in the above-captioned matter. Specifically you have requested that we determine whether the [REDACTED] filed an adequate informal claim for refund for the taxable year ending [REDACTED].

#### Issue

Whether the [REDACTED] filed an adequate informal claim for refund for the taxable year ending [REDACTED].

#### Facts

The [REDACTED] (formerly [REDACTED]) (" [REDACTED] ") filed its [REDACTED] corporate federal income tax return on [REDACTED]. The statute of limitations on assessment and claims for refund was extended several times to [REDACTED].

Sometime in [REDACTED], [REDACTED] submitted a document entitled "Attachment to Form 870-AD" to Appeals Officer Joseph Leist. That document served as [REDACTED]'s proposed attachment to a Form 870-AD (Offer of Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and of an Acceptance of Overassessment) ("the proposed attachment") for the taxable years [REDACTED], [REDACTED], and [REDACTED]. The proposed attachment stated that:

The taxpayer reserves the right to file a claim for refund or credit or prosecute a claim solely on the grounds that the Brazilian taxes of \$[REDACTED], withheld on interest payments to the taxpayer from the [REDACTED] in [REDACTED], are creditable against its U.S. tax, provided such right shall apply only if (i) the Tax Court or an appellate court holds that taxes withheld on interest payments from the [REDACTED] are creditable in the pending [REDACTED] case (docket # [REDACTED]), (ii) the Claims Court or an appellate court holds such taxes are creditable in the pending [REDACTED] case (docket # [REDACTED]), or

(iii) on or before [REDACTED], a court of competent jurisdiction or the Internal Revenue Service otherwise determines that such taxes are creditable.

On [REDACTED], [REDACTED] executed a Form 870-AD for the taxable years [REDACTED], [REDACTED], and [REDACTED]. The following statements were typed in below the standard language of the Form 870-AD:

Taxpayer reserves the right to timely file a claim for refund or credit or prosecute a timely filed claim solely on the grounds that the [REDACTED] taxes of \$[REDACTED], withheld on interest payments to the taxpayer from the [REDACTED] in [REDACTED], are creditable against its U.S. tax. This offer of waiver or restrictions is not to be construed as a claim for refund, formal or informal, concerning the matters for which the right to the claim is reserved.

On [REDACTED], [REDACTED] filed Form 1120X for the [REDACTED] taxable year claiming additional foreign tax credits in the amount of \$[REDACTED] relating to [REDACTED] taxes withheld in [REDACTED]. On [REDACTED], the claim was orally disallowed on the ground that the statute of limitations for claiming a refund had expired. [REDACTED] contends that it properly filed an informal claim for refund when it submitted the proposed attachment to Appeals Officer Joseph Leist in [REDACTED].

#### Discussion

In general, the statute of limitations on credit or refund expires three years from the time the return was filed or two years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within two years from the time the tax was paid. I.R.C. § 6511(a). This period of limitations may be extended by agreement of the parties. I.R.C. § 6511(c). Where the parties extend the period for assessment of tax, the period for filing a claim for refund is also extended and does not expire until six months after the expiration of the period within which an assessment may be made pursuant to the agreement. I.R.C. § 6511(c)(1). In the instant case, [REDACTED] filed its return on [REDACTED]. No payments were made after [REDACTED]. The statute of limitations on assessments as well as refunds was extended to [REDACTED]. Accordingly, [REDACTED] could have filed a claim for refund as late as [REDACTED].

In order for a taxpayer to obtain a credit or refund, the taxpayer must file a claim for credit or refund prior to the expiration of the statute of limitations. I.R.C. § 6511(b)(1). Here, [REDACTED] filed a formal claim for refund (the Form 1120X) on [REDACTED], after the statute of limitations for refund expired on [REDACTED]. Under I.R.C. § 7422, the claim for credit or refund must be filed with the Secretary prior to the commencement of a civil action for refund. Treas. Reg. § 301.6402-2(b) sets forth the procedure for filing a formal claim for refund. A formal claim for refund must set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the I.R.S. of the exact basis thereof. The statement of the grounds and facts must be verified by a written declaration that it is made under the penalties of perjury. A claim which does not comply with the requirements set forth in the Treasury Regulation will not be considered for any purpose as a claim for refund or credit.

Informal claims not in compliance with the Treasury Regulations have been held to be sufficient if they satisfy certain requirements of clarity and specificity. Martin v. United States, 833 F.2d 655, 659 (7<sup>th</sup> Cir. 1987). The informal action must be in writing and the matter set forth in the writing must be sufficient to apprise the I.R.S. that a refund is sought and to focus attention on the merits of the dispute so that an examination of the claim may be commenced if the I.R.S. wishes. Id. at 660. A writing that preserves the taxpayers right to file a future refund claim is not an informal claim for refund. Id.; United States v. Frauenthal, 138 F.2d 188 (8<sup>th</sup> Cir. 1943); Ordway v. United States, 37 F.2d 19 (2<sup>nd</sup> Cir. 1930); D'Amelio v. United States, 679 F.2d 313 (3<sup>rd</sup> Cir. 1982). [REDACTED]'s position is that it filed an informal claim for refund prior to the expiration of the statute of limitations for claiming a refund.

By letter dated [REDACTED], to the Internal Revenue Service, [REDACTED] contends that the proposed attachment submitted in [REDACTED], prior to the expiration of the statute of limitations for refund, qualifies as an informal claim for refund. The proposed attachment states that [REDACTED] "reserved the right to file a claim for refund or credit or prosecute a claim. . . ." if and when a contingent event occurred. In Martin, the taxpayer annexed a proviso to a Form 890-AD (Offer of Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and of an Acceptance of Overassessment) stating that the "taxpayer reserves the right to file a claim for refund relative to the following items: . . ." Martin, 833 F.2d at 658. Similarly, in Frauenthal, typed into a Form 890 was the statement "the executor reserves the right to file a claim for refund for any tax resulting from the payment in whole or in part of . . ."

Frauenthal, 138 F.2d at 190. In both cases, the Court held that those documents did not constitute informal claims for refund because the documents submitted to the I.R.S. were nothing more than a statement of the taxpayers' position and a forecast of what they proposed to do when the contingent claims ripened into noncontingent liabilities. Martin, 833 F.2d at 660; Frauenthal, 138 F.2d at 191. Accordingly, the proposed attachment does not fulfill the requirements of an informal claim for refund because it failed to claim a refund at the time it was submitted to the I.R.S..

█████ cites the cases of D'Amelio, 679 F.2d 313, and U.S. v. Kales, 314 U.S. 186 (1941), in support of its position that the proposed attachment qualifies as an informal claim for refund. █████ cites D'Amelio for the proposition that

. . . a claim is adequate if it is in writing, includes a request for a refund/credit for certain years or periods, informs the I.R.S. of the basis for the overpayment and provides sufficient information as to the tax year, to allow the I.R.S. to examine the claim.

We do not dispute that D'Amelio stands for this proposition, however, it does not support █████'s position. In fact, the Court in D'Amelio held that letters sent to the government stating that the "estate might someday assert a claim for refund if the estate ultimately concluded that it was entitled to one" did not satisfy the requirements of an informal claim for refund. D'Amelio, 679 F.2d at 315. Like the letters in D'Amelio, the proposed attachment submitted by █████ merely reserves a future right to claim a refund.

█████ also relies upon Kales stating that "a letter to the I.R.S. was a valid informal claim where no other steps were taken to file formal refund claim (sic)." █████'s interpretation of Kales is not wholly accurate. In Kales, the Supreme Court held that a letter from the taxpayer was an informal claim for refund where it stated that "upon the happening of the contingency the claim will be prosecuted," and the taxpayer later supplemented the informal claim with a formal claim. Kales, 314 U.S. at 196. Furthermore, the Supreme Court stated that if there was any doubt as to the status of the letter as an informal claim for refund, it was resolved by the I.R.S.'s treatment of the letter as an informal claim because the I.R.S. consistently treated the letter as a claim for refund in correspondence and at hearings subsequent to its submission to the I.R.S.. Id. at 196-197.

Kales may be distinguished from the instant case on two grounds: 1. [REDACTED]'s proposed attachment does not set forth a present claim for refund contingent upon the happening of an event; and 2. [REDACTED]'s proposed attachment was not administratively treated by the I.R.S. as an informal claim for refund. As previously discussed, the proposed attachment reserved the right to claim a refund in the future. It did not assert a present right to claim a refund contingent upon the happening of a future event. Moreover, the proposed attachment was not treated by the I.R.S. as an informal claim for refund in that it was not adopted as proposed on the Form 870-AD executed by the parties. In fact, the Form 870-AD executed by the parties expressly states that the offer of waiver or restrictions was not to be construed as a claim for refund, formal or informal, concerning the matters for which the right to the claim was reserved. In accordance with Kales, the proposed attachment does not satisfy the requirements of an informal claim for refund.

Although [REDACTED] does not presently contend that the Form 870-AD constitutes an informal claim for refund, should they raise it in the future, the Form 870-AD executed on [REDACTED], does not satisfy the requirements for an informal claim for refund. Like the proposed attachment, the Form 870-AD states that [REDACTED] "reserves the right to timely file a claim for refund or credit or prosecute a timely filed claim. . ." The Form 870-AD does not qualify as an informal claim for refund for same reasons stated above that the proposed attachment does not qualify as an informal claim for refund. Moreover, the Form 870-AD included language expressly stating that the offer of waiver or restrictions was not to be construed as a claim for refund, formal or informal, concerning the matters for which the right to the claim was reserved. Accordingly, [REDACTED] clearly intended not to treat the Form 870-AD as an informal claim for refund.

Should you have any questions regarding this matter, please contact Viviana Taverna of this office at (212) 264-1595, ext. 211.

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